Decision mailed: 9/19/08
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

CHRISTOPHER COLLETT,
Appellant

v.

G1-08-53

DEPARTMENT OF CORRECTION,
Respondent

Representative for the Appellant: Christopher Collett
Pro Se

Representative for the Respondent: Alexandra McInnis
Director of Personnel
Human Resources Department
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

Hearing Officer: Angela C. McConney, Esq.

DECISION

Pursuant to the provisions of G.L. c. 31 §2(b), the Appellant, Christopher Collett (hereinafter the "Appellant"), appeals the February 26, 2008 decision of the Department of Correction (hereinafter "DOC") denying his request for appointment as a Correctional Officer I (Certification Number 4080003, dated 01/22/08). The appeal was timely filed. A hearing was held on May 9, 2008 at the offices of the Civil Service Commission (hereinafter "Commission.") One tape was made of the hearing and is retained by the Commission. The record was left open for thirty (30) days in order for either party to submit further documents to the Commission.

FINDINGS OF FACT

Based on the four exhibits entered into evidence (Exhibits 1, 2, 5 and 6 from the Appointing Authority, Exhibits 3 and 4 from the Appellant), the testimony of Alexandra McInnis, Director of Personnel, DOC Division of Human Resources (hereinafter ("Director McInnis"), and the testimony of the Appellant, I make the following findings of fact:

1. The Appellant took the civil service examination for the position of Correction Officer I and signed the civil service list for employment, Certification Number 2080003, dated 01/22/2008.
2. Pursuant to the DOC pre-screening process for all applicants, the Appellant executed a written waiver allowing the DOC to perform a Criminal Offender Record Information (CORI) background check.
3. On or about February 6, 2008, the DOC received the results of the CORI check that revealed that the Appellant had been arrested for assault and battery, disorderly conduct, and disturbing the peace in 2004 (Exhibit 1).
4. The CORI check further revealed that all three charges were dismissed on April 22, 2004 (Exhibit 1).
5. On February 26, 2008, the Appellant received written notification that he was being bypassed for the position as a Correctional Officer I on the grounds that his background investigation had revealed an unsatisfactory criminal history check (Exhibit 2).
6. Director McInnis testified that the DOC has a longstanding guideline that candidates with CORI listings less than five years old will not be considered for employment as Correction officers.

7. This guideline is unwritten and is not found in the DOC Rules or Regulations. It is not written in any personnel policy. It applies to all applicants, whether or not the criminal action resulted in a conviction (Testimony of Director McInnis).
8. Although six (6) candidates bypassed for CORI activity within the last five years have appealed to the Commission, none has resulted in a decision from the Commission on the merits.
9. The Appellant filed a timely appeal with the Commission.

CONCLUSION

Basic merit principles as defined in G.L. c. 31, §1 require that employees be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration, and that they are protected from arbitrary and capricious actions. *See* Tallman v. Holyoke, G-2 134; *compare* Flynn v. Civ. Serv. Comm'n, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983).

The Appellant has appealed this action to the Commission, stating that the Appointing Authority lacked a reasonable justification for considering his arrest record contained within the Criminal Offender Registry Information (hereinafter "CORI report"). The Appellant argues that since his criminal record lists only an arrest relating to one - but no convictions - the Appointing Authority should be precluded from considering said record in determining whether to appoint the Appellant.

The twenty-five year old Appellant presented a mature demeanor to the Commission and was credible. He testified that the actions that led to his arrest in the 2004 incident occurred when he was much younger and that he has earned a great deal from them. He testified over and over

again that he wanted to state on the record that he "was not a criminal" and that he "was a good person."

Director McInniss testified that the DOC has a longstanding guideline of not considering candidates with a CORI record less than five years old. This guideline is objective in that it applies to every applicant, no one candidate has ever been exempted from this qualification. This unwritten guideline even applies when the CORI entry relates to an arrest, not a conviction, such as in the instant matter. For the Appellant, it will not be five years after the last court involvement on his criminal case until April 2009 (Exhibits 1 and 4). Ms. McInnis testified before the Commission that the Appellant was informed that he may reapply and be reconsidered after April 2009.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 332 (1983). *See* Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). It is undisputed that the Appellant was arrested on the charges of assault and battery, disorderly conduct, and disturbing the peace in early 2004 (Exhibit 1 and the testimony of the Appellant). It is also undisputed that

said charges were dismissed on April 22, 2004. (Exhibit 1, Exhibit 4 and testimony of the Appellant).

The Commission has long held in police original bypass cases that an applicant's arrest record, even when there is no conviction, is entitled to consideration in the determination as to whether that applicant should be appointed to a particular position. In Lavaud *v.* Boston Police Dep't, the Commission upheld the bypass of the Appellant for the position of police officer on the basis of his criminal history despite the fact that all the criminal charges against him had been dismissed. Lavaud, 12 MCSR 236 (1999). *See also* Tracey *v.* Cambridge, 13 MCSR 26 (2000) (Commission upheld the original bypass of Appellant with felony arrests but no convictions); Thames *v.* Boston Police Dep't, 17 MCSR 125 (2004) (Commission upheld bypass due to Appellant's long record of arrests although the charges were later dismissed); Brooks *v.* Boston Police Dep't, 12 MCSR 19 (1999) (Commission upheld original bypass despite age of criminal record); and Soares *v.* Brockton Police Dep't, 14 MCSR 168 (2001) (original bypass upheld because Appellant's "past conduct and criminal record demonstrate[d] lack of sound judgment and character unbecoming of a police officer.")

Director McInniss testified that the DOC's guideline to which the Appellant was subjected is an unwritten one. The Commission left the record open after the May 9, 2008 hearing so that she could submit evidence from the DOC documenting this practice. The DOC submitted records showing that in 2006, 145 applicants were screened out due to their CORI record. In 2007, that number decreased to 125. In 2008, that number was 73 as of July 31, 2008. Of these applicants from 2006-2008, less than 10% filed bypass appeals. (Exhibit 5) Within the last 2 years, 6 candidates have filed appeals with the Commission after being bypassed due to CORI record activity within the five years preceding their application. (Exhibit 6) However, none of these

appeals have resulted in a decision from the Commission on the merits of the case. (Exhibit 6)[1] The Appellant is the first such candidate.

The Appellant seeks appointment to the DOC, a position with considerable less public responsibility than that of a police officer. While an important position, the position of correction officer does not carry the same burden of public trust as that placed on officers of a police department. There is no need to hold applicants for the position of correction office to the same stringent standard required for police officers. The Appellant's position is a unique one: he readily admits that he partook in a bar fight, and the charges were all ultimately dismissed.

After consideration of all of the testimony and evidence in the record, I find that the DOC has not established just cause for bypassing the Appellant for selection as a Correction officer. The DOC relies on an unwritten and overly broad guideline that prohibits individuals with "any CORI activity" in the past five years from being appointed as a Correction Officer. It apparently does not matter to DOC what the underlying facts of the "CORI activity" are; the seriousness of the offense and/or the disposition reached regarding the alleged "activity." While Appointing Authorities are granted wide latitude in making hiring decisions, this overly broad undocumented policy - which fails to make any of the above-referenced distinctions - is not consistent with the tenets of basic merit principles. Moreover, the DOC appears to applying a higher standard than some of the larger police departments in Massachusetts for the position of police officer.

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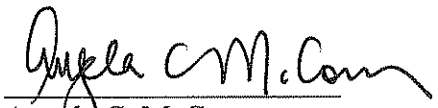
[1] G1-06-158 *Wosmy v. DOC*. The appellant did not appear at the full hearing, matter subsequently dismissed;
G1-06-193: *Smith v. DOC*. The appellant did not appear at the full hearing, matter subsequently dismissed;
G1-06-230: *Conklin v. DOC*. The appellant withdrew after full hearing;
G1-07-053: *Keaton v. DOC*. The appellant did not appear at the full hearing, matter subsequently dismissed;
G1-07-315: *Knuutila v. DOC*. The appellant withdrew before the full hearing;
G1-08-049: *Campion v. DOC*. The appellant did not appear at the full hearing, matter subsequently dismissed.

The DOC, in order ensure a hiring policy that is consistent with basic merit principles – and fairness – should develop a more equitable hiring policy that allows it and the Commission to evaluate whether or not there are sound and sufficient reasons to bypass the individual on a case-by-case basis. That has not happened in regard to the instant appeal. The Appellant was automatically – and unfairly – removed from consideration without any consideration of his individual application beyond the fact that he had "CORI activity" within the past five years.

For all of the above reasons, the Appellant's appeal filed under Docket No. G1-08-53 is hereby *allowed.*

Pursuant to Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts and Resolves of 1993, the Commission hereby grants equitable relief to the Appellant and orders the Department of Correction to place the Appellant's name at the top of the current eligibility list for the position of Correction Officer I until such time as he has received at least one consideration for the position of Correction Officer I. The Department of Correction may not automatically disqualify the Appellant for consideration as a result of its current undocumented practice of excluding individuals with any "CORI activity" within the past five years.

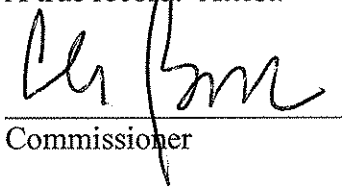
Civil Service Commission



Angela C. McConney
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis Stein and Taylor, Commissioners) on September 18, 2008.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Alexandria McInnis, Director of Personnel
Human Resources Department
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Christopher Collett
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